No. 82-960

In the Supreme Court of the United States

October Term, 1983

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CITY DISPOSAL SYSTEMS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ROADWAY EXPRESS, INC. AS AMICUS CURIAE

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BRIEF OF ROADWAY EXPRESS, INC. AS AMICUS CURIAE

CONSENT TO FILING

This Amicus Brief is filed, pursuant to Supreme Court Rule 36.2, with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The interest of Roadway Express, Inc. in this case arises from the fact that it is a party to a case recently decided by the Eleventh Circuit Court of Appeals containing issues identical to those in the case presently before this Court. *Roadway Express, Inc. v. NLRB*, 700 F.2d 687 (11th Cir. 1983). Roadway Express, like Respondent in this case, operates a trucking business and is a signatory to the *National Master Freight Agreement*, the collective bargaining agreement between the trucking industry and

the Teamsters Union. The National Labor Relations Board has filed a petition for a Writ of Certiorari with this Court in the *Roadway Express* case, No. 82-2061, upon which it has requested this Court to withhold action pending the outcome of this case.

SUMMARY OF ARGUMENT

Since *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enf'd*, 388 F.2d 495 (2d Cir. 1967), the National Labor Relations Board (the Board) has maintained that when a single employee claims a right under a collective bargaining agreement, he implicitly engages in concerted activity which is protected by Section 7 of the National Labor Relations Act. 29 U.S.C. §157 (the Act).

The Board has used *Interboro* to expand its jurisdiction to include all cases in which an employer disciplines an employee for the latter's breach of contract. This is an unwarranted extension of the Board's domain into private contractual matters, which was expressly forbidden by Congress. Grievance arbitration, as the method established by the parties for settling contractual disputes, is entirely capable of vindicating the employee wrongly disciplined by his employer. The Board, through *Interboro*, however, seeks to rewrite the collective bargaining agreement, to sidestep the arbitration process and to impose standards of conduct upon the parties quite different than those for which they bargained. The Board holds that an employee has a Section 7 right to act on his own interpretation of the collective bargaining agreement and to disregard his employer's directives, regardless of the correctness of the employee's position in terms of the contract. This interference in the contractual process deprives the employer of his right to maintain order and discipline in the workplace.

Furthermore, the *Interboro* doctrine contains critical flaws in logic. In this case, the Board applied the doctrine to an employee's refusal to work. Where, as in this case, employees have a collective bargaining agreement that contains a no-strike clause, the employees collectively may not engage in work stoppages or slowdowns not otherwise permitted by the contract. The Board's use of *Interboro* here, however, allows an individual employee to refuse to work in the name of his fellows where the group itself could not engage in such a refusal without breaching its contract.

The Board has jurisdiction over matters of employee discipline covered by contract in the case of a safety dispute only when such disputes fall under Section 502 of the Labor Management Relations Act. 29 U.S.C. §143. In order to trigger such jurisdiction, however, an employee must present the Board with *objective* evidence of a safety hazard which he claims to justify his refusal to work. Congress intended that the Board play a very limited role in safety disputes. Several other safeguards exist to protect the employee from hazardous working conditions, but they are not within the Board's domain.

ARGUMENT

I.

The Board Exceeds Its Jurisdiction by Injecting Itself Into Private Disputes Arising Under a Collective Bargaining Agreement.

Following its decision in *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enf'd*, 388 F.2d 495 (2d Cir. 1967), the Board repeatedly has found that any colorable assertion by an employee of a contract right, *whether legitimate under the contract or not*, is protected activity under the Act. As the Board in *John W. Sexton & Co.*, 217 N.L.R.B. 80 (1975), pointed out, it

> has consistently held that Section 7 of the Act protects employees['] attempts . . . to implement the terms of bargaining agreements *irrespective of whether* the asserted contract claims are ultimately found *meritorious* . . . .

Id. (emphasis supplied). *Accord, T&T Industries, Inc.*, 235 N.L.R.B. 517, 520 (1978). In this way, the Board is able to find that an employer can commit unfair labor practices merely by enforcing the collective bargaining agreement it has with its employees.

The Board, in its brief to this Court, maintains that under *Interboro*, Section 7 rights arise whenever an employee has "an honest and reasonable belief" that his claim is supported by a provision in the collective bargaining agreement. Pet. Brief at 23. This theory is based on the notion, originating in *Bunney Bros. Construction Co.*, 139 N.L.R.B. 1516 (1962), that since the collective bargaining agreement is a product of concerted activity, a

claim made by an employee under such an agreement is an *extension* of such concerted activity which is protected under Section 7.

This fiction is the source of much confusion over the proper extent of the Board's jurisdiction in employee-discipline cases. Many courts, wisely, have rejected it, finding that for conduct to qualify as concerted activity,

> it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964). *See Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983).

The mere link of an individual employee's action to *past* concerted activity is not sufficient. Hence, in *Mushroom Transportation, supra*, an employee's discussion with his employer of matters covered by the collective bargaining agreement was found not covered by Section 7. Similarly, in *Roadway Express, Inc. v. NLRB*, 700 F.2d 687 (11th Cir.), *petition for cert. filed*, No. 82-2061 (1983), the court held that neither an employee who challenged an earlier warning letter nor another employee who refused to drive a truck he felt was unsafe were engaged in concerted activity. *See also Kohls v. NLRB*, 629 F.2d 173 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981) (safety dispute); *ARO, Inc. v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979) (employee complaints about layoff); *NLRB v. C&I Air Conditioning, Inc.*, 486 F.2d 977 (9th Cir. 1973) (safety dispute).

The Board persists, however, in finding any employee claim or conduct that is even remotely related[1] to a collective bargaining agreement to constitute protected concerted activity under the Act.[2] In creating an unfair labor practice based upon this fiction, the Board interferes in private contractual relations, negates many bargained-for employer rights, and exceeds the jurisdiction which Congress contemplated for it.

A. Grievance Arbitration Fully Protects the Contract Rights of Employees Without Board Involvement.

The *Interboro* doctrine frequently leads to absurd, and unjust, results. If, pursuant to a contract, an employer imposes discipline which the employee believes is unjustified, the proper course for the employee is to file a grievance through the arbitration procedure established

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1. The Board seeks to have this Court adopt a standard whereby employee conduct is protected by Section 7 if there is a "reasonable nexus" between such conduct and collective action. Pet. Brief at 18-19. It fails, however, to provide any indication of what this "nexus" should entail. It also fails to present any affirmative evidence that Congress intended that Section 7, and the Board's jurisdiction, should be interpreted so broadly. Rather, it argues only that its interpretation is "not inconsistent" with Congress' intent. *Id.* at 15. In light, however, of Congress' explicit refusal to permit the Board to become involved in private contractual matters, *see* pp. 15-16, *infra*, there is little likelihood Congress could have intended that Section 7 should be read in a way which would result in the very Board involvement in contract interpretation and enforcement that it had forbidden.

2. The *Interboro* doctrine has received support from some circuits. *See, e.g., NLRB v. Ben Pekin Corp.*, 452 F.2d 205 (7th Cir. 1971); *NLRB v. Selwyn Shoe Mfg. Co.*, 428 F.2d 217 (8th Cir. 1970); *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967). *But see Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980).

by the parties under the contract. If the employee is right, he will be vindicated by the arbitrator. If the arbitrator finds that the employee is wrong, the employee under *Interboro* may get a second chance in the form of an unfair labor practice charge before the Board. This has the effect of negating the arbitration process and completely displacing the collective bargaining agreement.

Neither the Board nor the unions contend that the arbitration process is defective or unfair to the typical grieving employee. This Court, in fact, once described the no-strike clause as the union's *quid pro quo* for the employer's acceptance of binding grievance arbitration. *Boys Markets v. Retail Clerks Union*, 389 U.S. 235, 248 (1970). The private settlement of disputes through grievance arbitration is a cornerstone of our national labor policy. Congress established in Section 203(d) of the Labor Management Relations Act that

> [f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

29 U.S.C. §173(d). This Court recognized in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), that the arbitration of grievances is "a major factor in achieving industrial peace," and this Court consistently has favored resort to arbitration. *See, e.g., Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976); *William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12 (1974); *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964). Moreover, this Court, in *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974), established a "presumption of arbitrability" for safety disputes arising under a contract. *Id.* at 379.

Recently, this Court emphatically reaffirmed the principle that contractual disputes should be left to the arbitrator. In *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975), one issue was whether the contractual grievance procedure was sufficient to determine whether the employer had engaged in racial discrimination in violation of terms of the contract. This Court observed that clearly it was:

> The collective bargaining agreement involved here prohibited without qualification all manner of invidious discrimination and made any claimed violation a grievable issue. The grievance procedure is directed precisely at determining whether discrimination has occurred. That orderly determination, if affirmative, could lead to an arbitral award enforceable in court.

Id. at 66 (footnotes omitted).

The defects in *Interboro* become most apparent when an employee refuses to obey a supervisor's directive which the employee feels is in violation of the contract. This occurs frequently in the area of employee scheduling. For example, in *Michigan Screw Products Division of MSP Industries Corp.*, 242 N.L.R.B. 811 (1979), an employee repeatedly refused to accept overtime assignments, believing that the bargaining agreement permitted him to do so. He was discharged for his refusal. Instead of pursuing a grievance through the contractually-established procedure, he filed a charge with the Board. The Board found the employee's good faith belief in the correctness of his position sufficient to justify his refusal to work.

The Board, in permitting employees to refuse to work or follow a supervisor's directive on the basis of their own subjective interpretations of their contract, radically alters traditional industrial relations practice and invites anarchy in the workplace. The Board, through *Interboro*, removes

the employer's right to direct his workforce. It sanctions all manner of employee insubordination on the mere basis of an employee's own belief that his conduct is justified.[3] As two long-time authorities on industrial relations have pointed out, however,

> [i]t is a well established principle that employees must obey management's orders and carry out their job assignments, even if believed to violate the agreement, then turn to the grievance procedure for relief.

F. Elkouri & E. Elkouri, *How Arbitration Works*, 671 (3d ed. 1981) (hereinafter "Elkouri").

Courts routinely uphold this "work now, grieve later" principle. In *NLRB v. Maryland Shipbuilding and Drydock Co.*, 683 F.2d 109 (4th Cir. 1982), an employee felt that his work assignment was unsafe and that he was not obligated under the contract to perform it. His supervisor advised him to file a grievance at the end of his shift. Instead, the employee continued to refuse the assignment and pursued his complaint himself during his working time. He was fired, and the Board found a violation of his Section 7 rights. The Fourth Circuit emphatically disagreed, finding that the employee

> was entitled to file a grievance with respect to the work assignment and press it to arbitration, and any suspension of work in lieu of arbitration was in violation of the contract.

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3. The Board, in applying *Interboro*, does not even require that an employee base his belief on the contract. In *John W. Sexton & Co.*, *supra*, 217 N.L.R.B. 80, the Board declared that Section 7 "protects employees[']attempts . . . to implement the terms of bargaining agreements irrespective of whether . . . the employees . . . are even aware of the existence of such agreements." *Id.* By protecting the *ex post* rationalization of conduct which was not even based on any good faith belief at the time it was engaged in, the Board allows the workplace to be governed by employee whim rather than by the rule of the contract.

Id. at 112. In *Roadway Express, supra,* 700 F.2d 687, an employee had been erroneously issued a warning letter by his employer. After notifying the employer of the mistake and being assured that the matter would be corrected, he ignored orders to return to work and continued to press the issue. He was then issued a reprimand for wasting time. The Eleventh Circuit refused to enforce the Board's finding that the employee's Section 7 rights were violated. The employee was disciplined not for asserting his contract right to an accurate disciplinary record, as the Board held, but for disobeying his employer's directive to return to work and make his inquiries through the proper contractual channels.

In the case presently before this Court, the bargaining agreement permitted an employee's *justified* refusal to operate unsafe equipment.[4] The Board, however, found an employee who had a good faith, but not necessarily justified, belief that his truck was unsafe to be protected in his refusal to drive. It effectively sanctioned the employee's violation of his collective bargaining agreement. This the Board cannot do.

Undoubtedly, every employee will not always be satisfied with the remedies provided him by grievance arbitration. It may also happen that an employee's union may not share the employee's conviction about the merits of his cause and decline to prosecute it to the fullest possible extent.[5] While this arguably may constitute a shortcoming

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4. The contract states, in pertinent part: "It shall not be a violation of this Agreement where employees refuse to operate [unsafe] equipment unless such refusal is unjustified." *City Disposal Systems, Inc.*, 256 N.L.R.B. 451, 452 (1981). *See also National Master Freight Agreement*, Art., 16, §1 (1979).

5. Such occurred in this case, as the complaining employee's union found no merit in his safety objections, and thus declined to process his grievance to arbitration for his discharge over the dispute. *See City Disposal Systems, Inc., supra,* 256 N.L.R.B. at 453.

in the grievance arbitration system, it cannot justify the Board's assertion of jurisdiction over contract issues in order to guarantee satisfaction of every claim of every employee, as some have suggested. *See, e.g., General American Transportation Corp.*, 228 N.L.R.B. 808, 813 (1977) (Chairman Murphy, concurring); Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U.Pa.L.Rev. 286, 358 (1981); Note, *National Labor Relations Act Section 7: Protecting Employee Activity Through Implied Concert of Action*, 76 Nw.U.L.Rev. 813, 828-29 (1981). Indeed, what this view in effect holds is that if a union is incapable of effectively representing its membership, the government must step in and assume the union's role. Such a notion, however, is entirely inconsistent with the concept of industrial relations which has long prevailed in this country.

The costs, as well as the benefits, of grievance arbitration are apparent to the employee at the time he votes for a bargaining representative in a union election or chooses to accept employment at a firm under union contract. In *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), this Court stated:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents.

Id. at 338. *See also NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

It must be recognized that employees already have numerous protections against union abuse of their rights. Unions are held by this Court to a duty of fair representation in processing employee grievances. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). The right of employees to present grievances to the employer independently of their union is protected by Section 9(a) of the Act. 29 U.S.C. §159(a). Employees are protected by Section 8(b)(1)(A) of the Act, 29 U.S.C. §158(b)(1)(A), against union interference with their right to engage in concerted activity. They have the right under Section 9(c)(1)(A) of the Act, 29 U.S.C. §159(c)(1)(A), to petition for decertification of a union of which they disapprove. Other protections are available as well. *See Emporium Capwell, supra*, 420 U.S. at 64-65.

Employees, therefore, are adequately protected by existing law against union capriciousness. When they have freely chosen to be represented by a union and have bargained for binding grievance arbitration, they must be held to that bargain. If the arbitrator finds that an employee was justified in his contractual claim and that his employer's disciplinary action was therefore unwarranted, the arbitrator typically will order that the employee be reinstated with full back pay. *See, e.g., Consolidated Edison Co. of New York, Inc.*, 71 Lab. Arb. 238 (1978) (Kelly, Arb.); *Ozark Border Electric Cooperative*, 67 Lab. Arb. 328 (1976) (Maniscalco, Arb.). *See generally*, Elkouri, *supra*, at 648. Grievance arbitration provides a full, fair and effective remedy to the employee who is wrongly disciplined by his employer. There is no need for Board intervention in this area.[6]

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6. It is not contended here that the Board should *defer* its jurisdiction to the arbitrator under the doctrines established in *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955) and *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971). Rather, it is the position of this Amicus that the Board has no jurisdiction in this area to defer. *See Kohls, supra*, 629 F.2d at 179.

B. The Board, Through *Interboro*, Improperly Interferes With the Contract Rights of the Employer.

Interboro deprives the employer of the benefit of his bargain. The Board, through *Interboro*, usurps the employer's right to manage the workplace in an efficient and orderly manner—the manner contemplated by the parties to the bargaining agreement. An employer generally has the right under a contract to discharge or discipline employees for just cause, including misconduct or failure to abide by the contract. When the employer does so, however, under *Interboro* he may be punished by the Board merely for interpreting and applying the terms of the contract. *See* Pet. Brief at 22 n. 10, 24 n. 12, 25 n. 14. For even if an arbitrator finds an employer's disciplinary action to be justified, under *Interboro* the Board may substitute its judgment for that of the arbitrator and order the employee reinstated.

This anomaly results because the Board applies a "good faith belief" standard in determining whether an employee's actions are protected under Section 7 of the Act. Most collective bargaining agreements explicitly or implicitly provide, however, that an employee's belief that he has a right to engage in (or refrain from) certain conduct must be "justifiable" or "reasonable." These standards largely depend on specific circumstances and the judgment of the arbitrator, but more than a mere personal belief generally is required. *See* Elkouri, *supra*, at 674-75. Under *Interboro*, therefore, the Board effectively requires an employer to prove not that an employee's actions were unjustified under the contract, but that an employee acted in bad faith in asserting a contract claim, before he is permitted to discipline that employee for breach of contract.

In substituting its own standard for the standard contractually established by the parties, the Board effectively

re-writes the collective bargaining agreement. It deprives the employer of his right to discipline an employee who wrongly acts on a claimed right under the contract contrary to his employer's directive. The Board does not have the authority to do this. In *Porter Co. v. NLRB*, 397 U.S. 99 (1970), this Court recognized "the fundamental principle that the National Labor Relations Act is grounded in the premise of freedom of contract." *Id.* at 107. The Court in *Porter* went on to declare that the Board

> is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.

Id. at 102. This Court on several occasions has recognized that the Board has no power to alter the rights of parties under a contract, or to impose "its own view of what the terms and conditions of the labor agreement should be." *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427-28 (1967). *See also NLRB v. Strong*, 393 U.S. 357 (1969); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

Where the parties to a labor agreement bargain for a procedure by which to settle disputes arising under such agreement,[7] the Board has no authority to interfere with

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7. In industries where safety is frequently an issue, the parties to the contract frequently create a shop-floor procedure for settling safety disputes, in addition to standard grievance arbitration procedures. In *Roadway Express, supra*, 700 F.2d 687, for example, the contract provided that following the pre-trip safety check by the maintenance department, if an employee believed a vehicle to be unsafe, he was first to turn it over to the garage supervisor for inspection. If the supervisor found no defects the employee would be directed to operate the vehicle. If the employee was still not satisfied, he could request that a Class A union mechanic inspect the vehicle for a third opinion. If the vehicle passed the union mechanic's scrutiny also, the local agreement provided that the complaining employee be issued a written reprimand for delaying freight. *See Roadway Express, Inc.*, 257 N.L.R.B. 1197, 1198 (1981), *enf. denied*, 700 F.2d 687 (11th Cir.), *petition for cert. filed*, No. 82-2061 (1983). When the employee in *Roadway Express* demanded a union mechanic's

(Continued on following page)

this procedure. *Kohls, supra,* 629 F.2d 173, contains facts nearly identical to those before the Court here. An employee refused to perform a work assignment, claiming a good-faith belief that his equipment was unsafe. The employer considered his refusal to be "unjustified," under the contract term that allowed a driver to refuse to operate equipment he considers unsafe unless such refusal is "unjustified." The employer discharged the employee. The Board found that the employer committed an unfair labor practice by discharging the employee, allegedly for asserting his Section 7 rights under the Act. The District of Columbia Circuit, however, declared that the employee's claim was solely a contractual one, "unrelated to an unfair labor practice, [and] the Board has no authority to resolve the contractual issue." *Id.* at 179.

In order to evade this Court's repeated directives not to become involved in matters of private contract, the Board, through *Interboro,* has thus created unfair labor practices out of mere contractual disputes. Its source of authority for such a move is something of a mystery since Congress itself expressly declined to take such action. In its 1947 amendments to the Act, Congress considered and rejected a proposed Section 8(a)(6) of the Act, which would have made an employer's breach of a collective bargaining agreement an unfair labor practice. The House of Representatives objected to this provision

> on the ground that it would have the effect of making the terms of every collective agreement subject to interpretation and determination by the Board.

Footnote continued—

inspection, such inspection revealed no defects, and the employee was issued a reprimand for wasting time in accordance with the contract. The Board, under *Interboro,* found the employer guilty of an unfair labor practice. *Id.* at 1197. In doing so, the Board ignored the fact that concomitant with the employee's right to ensure the safety of his vehicle was the employer's negotiated right to discipline the employee for using the contractual procedure as a means of wasting time.

Statement of Senator Taft, 93 Cong. Rec. 6443 (1947). *See Dowd Box v. Courtney*, 368 U.S. 502, 510-11 (1962). In applying *Interboro*, the Board engages in the very interpretations and determinations of collective bargaining agreements which Congress forbade. The Board has "moved into a new area of regulation which Congress had not committed to it," in flagrant disregard also of this Court's directions to the contrary. *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960). *See also American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965) ("[T]he Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management").

II.

If, Under *Interboro*, a Single Employee's Refusal to Work Is Implicitly Concerted Activity, Then It Is Also Implicitly a Strike in Violation of a Contractual No-Strike Clause.

Unorganized workers may invoke Section 7 of the National Labor Relations Act, to justify a concerted refusal to work. In *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), this Court held that a walkout by non-union employees in protest of a cold workplace was concerted activity protected by Section 7. The court pointed out, however, that the employees involved

> had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances they had to speak for themselves the best they could.

Id. at 14.

Unionized employees, by contrast, generally do not enjoy the same broad protection of Section 7 as do their

unorganized counterparts. In collective bargaining agreements, unions may waive the right of their membership to strike, *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956), and many modern contracts contain no-strike clauses. Typically, the no-strike provision is accompanied by a clause in which the employer and the union agree to settle disputes arising under the contract through a grievance arbitration procedure.[8]

Under a no-strike clause, employees waive their Section 7 right to engage in concerted refusals to work. *See Fournelle v. NLRB*, 670 F.2d 331, 335 (D.C. Cir. 1982), and any work stoppage constitutes grounds for dismissal. *Mastro Plastics, supra*, 350 U.S. at 280. Work slowdowns are also prohibited under a no-strike clause. *Seattle Times Co. v. Seattle Mailer's Union*, 664 F.2d 1366, 1368 (9th Cir. 1982). Unionized employees are thus bound to follow grievance arbitration procedures established under their contract in lieu of collectively pursuing their own "self-help" remedies.

An employer commits an unfair labor practice under Section 8(a)(1) of the Act by interfering, restraining or coercing employees in the exercise of their Section 7 rights. 29 U.S.C. §158(a)(1). Since employees waive their Section 7 rights under a no-strike clause, however, it follows that an employer cannot commit an unfair labor practice by disciplining employees for a breach of their contract's no-strike clause.

Several courts of appeals have refused to enforce Board orders finding employers in violation of Section

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8. The contract between the employer and the union in the case presently before the Court contains both no-strike and binding arbitration provisions. In one sample of collective bargaining agreements nationwide, 97% contained arbitration clauses and 94% contained agreements not to strike. 2 Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts* §§51:1, 77:1 (1983)

8(a)(1) for discharging employees who walk off the job in violation of a no-strike clause. In *Irvin H. Whitehouse & Sons Co. v. NLRB*, 659 F.2d 830 (7th Cir. 1981), the court upheld the employer's discharge of two workers who refused to work under what they believed were unsafe conditions. The court stated that the employees' refusal to work "was a method of protest they had given up in return for binding arbitration." *Id.* at 836. In *Food Fair Stores, Inc. v. NLRB*, 491 F.2d 388 (3d Cir. 1974), the court denied Section 7 protection to twenty-one drivers who walked out in a dispute over working conditions. Since the employees breached their obligation not to strike, the court declined to find that the employer had committed an unfair labor practice in firing them.

The Board, in *Interboro*, invented the notion that when a single employee asserts a right under a collective bargaining agreement, he implicitly engages in concerted activity subject to the protection of Section 7 of the Act. The Board assumes, under the *Interboro* doctrine, that an employee who speaks or acts on a subject covered in a collective bargaining agreement is speaking or acting in the name of his fellows. The Board considers the employee's actual intent to be irrelevant. As it states in the brief it has submitted to this Court, the *Interboro* doctrine depends on the idea that

> an employee who speaks up concerning an employer's action that may violate the collective agreement is acting in the interest of all, whether he is acting out of conscious altruism or merely out of a desire to preserve his own immediate stake in the controversy.

Pet. Brief at 21. The Board's theory collapses, however, upon an examination of those rights which the Board claims the employee asserts.

If an individual employee putatively acts on behalf of a group of his fellows, he can assert only those rights which the group itself could assert. It is clear, however, that if the group were covered by a no-strike clause and refused to perform a work assignment an illegal strike would occur. *Interboro* thus presents a paradox wherein an individual can assert the rights of a group which the group itself cannot exercise. The Board must not be permitted to maintain this inconsistency in the law. If employees collectively have no right to engage in a work stoppage in violation of their contract, an individual employee should not be permitted to do so on a theory of implied concerted activity.

In *Kohls, supra*, 629 F.2d 173, an employee, covered by the same contract language as in this case, refused to drive a truck which he contended was unsafe. He was discharged for his refusal and he filed a grievance. He subsequently withdrew the grievance and filed an unfair labor practice charge, alleging that the employer violated his Section 7 rights by firing him. The Board found that the employer committed an unfair labor practice, but the Court of Appeals disagreed. The court held that *Interboro* did not apply to the facts of the case, primarily because the employee "did not assert an interest on behalf of anyone other than himself." *Id.* at 177. The court also stressed, however, that the employee could not himself have engaged in activity which his union could not undertake:

> We should note that an anomalous result would be reached if we were to enforce the Board's finding of an unfair labor practice in this case. During oral argument, counsel for the Board conceded that, absent a claim rooted in Section 502 of the LMRA, the union could not have urged its members to engage in con-

> certed action to enforce the applicable terms of the contract between the [union and the employer] . . . . It thus seems contradictory for the Board to argue here that an employee, acting pursuant to the same contract that binds the union, can engage in "concerted" activity that the union would be barred from taking.

Id. at 178 (footnote omitted). If an employee can justify to an arbitrator his refusal to perform a work assignment, he should do so. If he cannot, this Court should not allow the Board to permit him to engage in a strike in violation of his contract under the fiction of it being "implied concerted activity."

Much of the controversy over the *Interboro* doctrine, therefore, misses an important point. While the issue of whether the action of an individual employee can be construed as being concerted is most frequently debated, equally significant is whether such action is *protected* by the Act. Where employees have bargained away their right to strike, any subsequent refusal to work not consistent with the terms of the contract is clearly not protected, whether on the part of one employee, two employees, or the entire shop. *See Economy Tank Line*, 99 LRRM 1198 (1978) (NLRB General Counsel Advice Memorandum).

The argument advanced by the Board in this case, Pet. Brief at 26-27, and put forth by others as well,[9] that *Interboro* should be affirmed because an employee's ability to assert a collective right should not depend upon the fortuitous presence of another employee, is but a makeweight. In refusal to work situations, it is irrel-

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9. *See, e.g., McLean Trucking Co. v. NLRB*, 689 F.2d 605 (6th Cir. 1982); Gorman & Finkin, *supra*, 130 U.Pa.L.Rev. at 347-50.

evant that a driver may be accompanied by a helper on the truck he refuses to drive, or that he files a grievance with his union, or even that he refuses to work on instructions from his union. *See McLean Trucking, supra,* 689 F.2d 605. If an employee covered by a no-strike clause refuses a work assignment, he breaches his collective bargaining agreement,[10] and this Court has held that his breach is not protected activity under Section 7 of the Act. *Washington Aluminum, supra,* 370 U.S. at 17; *NLRB v. Sands Mfg. Co.,* 306 U.S. 508, 514 (1939).

Finally, to allow an employee to refuse to work, in violation of the procedures established under the contract for settling workplace disputes, is in effect to allow him (and the group he putatively represents) to force the employer to modify the contract in his favor. This Court explicitly prohibited such a move in *Emporium Capwell, supra,* 420 U.S. 50.

In *Emporium Capwell* a group of minority employees objected to their employer's treatment of racial minorities. They filed a grievance through their union, but subsequently became disenchanted with the union's attempts to settle the dispute. They picketed the employer and distributed handbills to the employer's customers. When the employees refused to cease picketing and demanded to deal directly with the employer's president, they were discharged. Upon the filing of an unfair labor practice charge, the Board found that the employees' actions, while concerted, were not protected by Section 7 of the Act.

This Court upheld the Board's dismissal of the complaint. At issue was whether employees pursuing extra-contractual remedies through concerted activity were en-

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10. The only exception is if his refusal is covered by Section 502 of the Labor Management Relations Act, which is addressed in Section III of this Brief, *infra.*

gaged in protected activity under Section 7, where they believed their employer discriminated against them on the basis of race in violation of a contract provision prohibiting such discrimination. This Court held that they clearly could not. The Court reasoned that to allow "self-designated representatives [who] purport to speak for all groups that might consider themselves to be victims of discrimination" to pursue a remedy outside of the contract, would impermissibly disrupt "the orderly collective bargaining process contemplated by the NLRA." *Id.* at 68-69.

Section 7 thus does not provide protection for employees who engage in "self-help" concerted activity against racial discrimination, even in spite of the "national labor policy [which] embodies the principles of nondiscrimination as a matter of highest priority." *Id.* at 66. It is therefore inconsistent that an employee under the guise of "constructive concerted activity" engaged in a safety dispute, or in any dispute with his employer, should have the aid of Section 7 and the Board in attempting to evade the contractual obligations of the employees on whose behalf the Board considers him to act.

III.

The Board Has Jurisdiction Over Employee Discipline Matters Covered by Contract in the Case of Safety Disputes Only When Such Disputes Are Covered by Section 502 of the Labor Management Relations Act.

Since an employee's refusal to work in protest over a safety dispute in the face of a no-strike clause is not protected under Section 7 of the Act, the Board is limited to asserting its jurisdiction in such cases only if Section 502

of the Labor Management Relations Act applies. That section states, in pertinent part:

> [N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

Section 502 effectively creates an exception to a contractual no-strike clause, so that an employee's refusal to work in the face of "abnormally dangerous conditions" does not constitute a breach of the bargaining agreement. *See Economy Tank Line, supra,* 99 LRRM at 1199.

This Court, in *Gateway Coal, supra,* 414 U.S. 368, held that employees seeking coverage of Section 502 must present *"ascertainable, objective* evidence supporting [their] conclusion that an abnormally dangerous condition for work exists." *Id.* at 386 (emphasis supplied). This Court reversed the court below for

> concluding that an honest belief, no matter how unjustified, in the existence of "abnormally dangerous conditions for work" necessarily invokes the protection of §502 . . . . Absent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be.

Id. at 385-86. Thus, this Court has established that concerted activity may not take the place of grievance arbitration except in the most extreme and well-documented cases.

The Board, in the case before this Court, seeks to avoid this Court's *Gateway Coal* decision by casting safety dis-

putes in terms of Sections 7 and 8(a)(1) of the Act. It applies a subjective "good faith" standard to an employee's belief that unsafe conditions exist,[11] effectively legislating Section 502 out of existence. Apart from being contrary to the intent of Congress and the mandate of this Court, this is also logically indefensible. The Board concedes that an employee is not covered by Section 7 if he protests only in his own right. *See* Pet. Brief at 16 n. 9. He is brought within the protection of Section 7 solely by means of the *Interboro* notion that he putatively represents his fellows in making his protest. As demonstrated in Part II of this Brief above, however, such an employee can assert no more rights in the name of the group than could the group itself assert. Under *Gateway Coal* the Board has no jurisdiction to protect the group in their refusal to work for safety reasons unless they can present the objective evidence required by Section 502.

Further evidence of Congress' intent that a worker may not evade a work assignment merely on his own subjective belief that his equipment is unsafe can be found in two other statutes. Section 405(b) of the Surface Transportation Assistance Act of 1982 provides in pertinent part:

> No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions or privileges of employment for refusing to operate a vehicle . . . because of the employee's *reasonable* apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a *reasonable person*, under the circumstances then confronting the em-

11. *See City Disposal Systems, Inc., supra*, 256 N.L.R.B. at 454.

> ployee, would conclude that there is a bona fide danger of accident, injury or serious impairment of health, resulting from the unsafe condition.

49 U.S.C. §2305(b) (emphasis supplied).

Similarly, Section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. §660(c), protects employees who exercise rights granted under that Act. Pursuant to that Section, the Secretary of Labor promulgated a regulation protecting a worker's right not to accept a work assignment which threatens serious injury or death. 29 C.F.R. §1977.12(b)(2).[12] The regulation is clear, however, that

> [t]he condition causing the employee's apprehension of death or injury must be of such a nature that a *reasonable person,* under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury.

Id. (emphasis supplied). This Court upheld this regulation in *Whirlpool Corp. v. Marshall,* 445 U.S. 1 (1980). Thus, Congress already has established safety standards to protect employees, and has made quite clear its intent that government protections are not to be triggered by anything less than objective evidence. The Board again exceeds its authority by attempting to legislate a further means of government involvement in employee safety, carrying a standard much lower than any ever set by Congress.

It must be emphasized, however, that the protection provided by federal law is not the employee's only, nor his best, protection against safety hazards. He is protected

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12. It is significant that the regulations promulgated under Section 11(c) of the Occupational Safety and Health Act recognize the importance of the labor contract and arbitration by suggesting deferral to arbitration of the safety issue under the collective bargaining agreement. 29 C.F.R. §1977.18.

at all times by his bargaining agreement, which commonly imposes a much more flexible standard. For example, the contract in this case provides that an employee's refusal to operate unsafe equipment must be "justified." *See National Master Freight Agreement,* Art. 16, §1. If the employee's refusal meets that standard, he will prevail in arbitration even though he may not be able to present objective evidence. The important point, however, is that the contractual standard is to be applied by the arbitrator, not by the Board.

Once again, the issue is not one of adequately protecting employees, but one of expanding Board jurisdiction. The Board, in apparent disregard of the will of Congress and the mandates of this Court, has used the wholly impertinent "good faith belief" standard of Section 8(a)(1) of the Act to inject itself into employee safety disputes. The Board must be restricted from involving itself in any employee safety dispute covered by a collective bargaining agreement unless an employee comes forth with objective evidence of a hazard as required by Section 502.

CONCLUSION

Amicus Roadway Express, Inc. respectfully submits that for the above-stated reasons this Court should affirm the decision of the United States Court of Appeals.

Respectfully submitted,

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